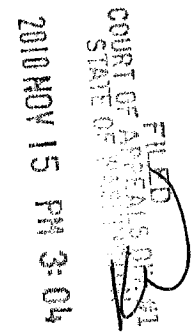
No. 65119-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I



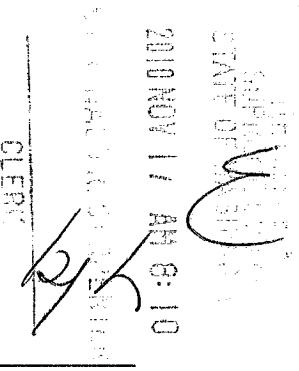
DANA CLAUSEN,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.



REPLY BRIEF OF ICICLE SEAFOODS, INC.

Michael A. Barcott, WSBA #13317
Megan E. Blomquist, WSBA #32934
Thaddeus J. O'Sullivan, WSBA #37204
HOLMES WEDDLE & BARCOTT, P.C.
999 Third Avenue, Suite 2600
Seattle, Washington 98104
(206) 292-8008

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Rules

Treatises

I. SUMMARY OF ARGUMENT ON REPLY

"If the facts are against you, argue the law. If the law is against you, argue the facts. If the law *and* the facts are against you, pound the table and yell like hell."

Carl Sandburg, *The People, Yes* (1936)

Despite Clausen's attempt to divert the court's attention with a long recitation of Icicle Seafoods' alleged misdeeds, this appeal turns on questions of law, not findings of fact. The jury found that Icicle was "unreasonable" and "callous and indifferent" or "willful and wanton" in its handling of Clausen's maintenance and cure claim. While Icicle does not agree with that characterization, it does acknowledge that the jury so found, and it therefore has not challenged those findings on appeal.[1]

At issue here are purely legal questions to which federal maritime law provides compelling answers. Under federal maritime law, attorney fees for the willful and wanton failure to pay maintenance and cure are an element of damages, and as such, must be decided by the jury. Federal maritime law also provides that punitive damages awarded for the willful

[1] Clausen nevertheless devoted eight pages of his response brief to reciting the facts in evidence that led to the jury's findings. As part of this attempt to distract the Court from the legal questions at issue here, Clausen also made note of the discovery sanctions Judge Hill awarded against Icicle and its counsel following the conclusion of trial. Again, Icicle has not challenged the sanctions order on appeal, and the circumstances that gave rise to that order simply have no bearing on the legal issues presented on appeal.

and wanton failure to pay maintenance and cure are subject to the 1:1 ratio between compensatory and punitive damages set forth in Exxon Shipping Co. v. Baker.

II. ARGUMENT

A. Clausen's Failure of Proof with Regard to Attorney Fees Warranted Dismissal of His Attorney Fee Claim.

Under applicable federal maritime law, attorney fees for the willful and wanton failure to pay maintenance and cure are an element of damages that must be proven to the jury. Clausen failed to offer any evidence of attorney fees to the jury. By moving for judgment as a matter of law on the attorney fee claim based on Clausen's failure of proof, Icicle properly preserved the issue for appeal. Because the trial court erred in denying Icicle's motion and in usurping the jury's role as factfinder with respect to the attorney fee issue, the decision below on attorney fees must be reversed.

1. Icicle Properly Preserved the Attorney Fee Issue for Appeal.

Clausen's leading argument is that Icicle waived its right to appeal the attorney fee issue by failing to object to the trial court's failure to give Icicle's requested jury instruction on the issue of fees and its proposed

verdict form.[2] This is not a jury instruction issue. It is instead a failure of proof issue. Clausen put no evidence whatsoever before the jury regarding attorney fees. A party's failure to prove damages on a particular claim warrants dismissal of that claim. Pizani v. M/V COTTON BLOSSOM, 669 F.2d 1084, 1088 (5th Cir. 1982); Olsen v. White, 37 Wn.2d 62, 65, 221 P.2d 542 (1950).

Icicle properly brought a motion for judgment as a matter of law at the close of Clausen's case based on Clausen's failure to offer any evidence supporting his claim for attorney fees. A party's motion for judgment as a matter of law sufficiently preserves the issue for appeal. Rhoades v. De Rosier, 14 Wn. App. 946, 948 n.2, 546 P.2d 930 (1976). In Rhoades, this Court stated:

> While instructions to which no exception is taken become the law of the case, the doctrine does not bar review of the granting or denial of a directed verdict. Whether a verdict should have been directed is a question of law, and its resolution is not controlled by the pronouncements of the instructions, but by the *applicable*

[2] Clausen also asserts that a party must also offer a correct statement of the law to preserve an error in jury instructions for appellate review. Response at p. 18. This case does not involve an error in jury instructions. It involves a failure of proof. The trial court's error was its failure to dismiss a claim for which there had been a complete failure of proof, not its failure to instruct the jury on attorney fees. Icicle's proposed jury instruction No. 22 was, in fact, a correct statement of the law as regards a party's burden to segregate time entries attributable to a particular cause of action, but the correctness or incorrectness of that proposed instruction is irrelevant in light of the trial court's decision to take the attorney fee question out of the hands of the jury.

> law. [. . .] **A timely motion for a directed verdict and its subsequent denial preserves the issue for review.** [. . .] **The failure to object to instructions does not, therefore, preclude an appellate consideration of a trial court's denial of a motion for a directed verdict.**

Id. (italic emphasis in original, bold emphasis added, citations omitted).

The Rhoades decision also makes clear that when reviewing the trial court's denial of a motion for judgment as a matter of law, the appellate court applies the same legal standard in deciding the same question of law that the trial court did. Id. Thus, the proper standard of review here is de novo, and not the abuse of discretion standard advocated by Clausen.

2. Under Federal Maritime Law, the Jury, Not the Court, Must Determine the Attorney Fee Issue.

Even though this case was brought in state court, the court was bound to apply federal maritime law, not Washington law, to all substantive issues. Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 878, 224 P.3d 761 (2010). Contrary to Clausen's assertion, Icicle's basis for asserting that the attorney fee issue must go to the jury is not just a Washington procedural rule, but is more importantly a matter of substantive federal maritime law. While it is true that CR 54(d)(2) lends further support to Icicle's position, it is federal maritime law that dictates that attorney fees are an element of damages that must be decided by the

jury.

In his response, Clausen focuses on the rarity of circumstances in which Washington courts have found that attorney fees are a form of damages to be determined by the jury. Response at p. 20. Washington law on the issue is irrelevant here. This is a maintenance and cure action, which is a creature of federal maritime law.

Attorney fees were first awarded for willful and wanton failure to pay maintenance and cure in Vaughan v. Atkinson, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962). In its opening brief, Icicle noted the Vaughan Court's unmistakable references to attorney fees in this context as a form of damages. 369 U.S. at 530-31 ("It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance and cure than this one."). In spite of the Vaughan Court's clear statements regarding damages, presented in direct contrast to attorney fee awards made on an equitable basis, Clausen nevertheless argues that the Vaughan Court awarded fees in equity, either as an equitable exception to the American rule or as an exercise of its equitable power in admiralty. Response at pp. 21-25. These arguments are without merit.

While the Supreme Court may have subsequently alluded to the Vaughan decision as an equitable departure from the American rule

regarding attorney fees, it has done so only in non-maritime cases. Response Brief at p. 23, n.22 (citing eight non-maritime cases). Furthermore, any such characterizations must be tempered by the Court's unequivocal language in Vaughan itself, where it specifically referred to attorney fees as "damages" for wrongful denial of maintenance and cure. 369 U.S. at 531.[3]

It is true, as Clausen asserts, that the Court's decision in Vaughan left some room for interpretation as to the particular theory upon which the Court awarded fees. In the years following Vaughan, courts and commentators have written extensively about the legal premise upon which Vaughan fees are based. See, e.g., Healy, George W. III, *Remedies for Maritime Personal Injury and Wrongful Death in American Law: Sources and Development*, 68 Tul. L. Rev. 311, 320-22 (1994) ("Although

[3] Clausen's alternative argument, that the Vaughan Court's award of attorney fees was "based on an exercise of equitable power in admiralty" has no bearing on the present case. While a federal court sitting in admiralty may indeed exercise equitable powers, a state court may never sit in admiralty. Linton v. Great Lakes Dredge and Dock Co., 964 F.2d 1480, 1487 (5th Cir. 1992); see also Endicott, 167 Wn.2d at 887. Thus, even if it were arguably true that this was the basis for the Supreme Court's attorney fee award in Vaughan, it cannot possibly be the basis for the trial court's award of attorney fees in this case. Nor does this case involve a question of who has the right to demand a jury, as Clausen seems to suggest with his reference to Endicott and the Washington Constitution. Response at p. 25. Icicle is not invoking a right to demand a jury on the attorney fee issue. It is instead asserting that because Clausen invoked his right to a jury in this case, that jury was charged with the determination of factual issues, including the amount of damages, and specifically the amount of attorney fees.

the result in Vaughan is unambiguous, the theory on which the decision rests is not clearly articulated."); Carr, Stephen K., *Living and Dying in the Post-Miles World: A Review of Compensatory and Punitive Damages Following Miles v. Apex Marine Corp., 68 Tul. L. Rev. 595, 616-17*"); see also Kraljic v. Berman Enterprises, Inc., 575 F.2d 412, 413-14 (2d Cir. 1978).

A review of the jurisprudence on the topic of Vaughan fees reveals that regardless of the theory upon which the fees were awarded, there is agreement that the attorney fees awarded in Vaughan were an element of damages. See, e.g., G. Gilmore & C. Black, *The Law of Admiralty*, p. 313 (2d ed. 1975) (noting that Vaughan justices were, in effect, "unanimous" on damages recovery). The focus of the controversy has been instead on whether they are a form of compensatory damages or a form of punitive damages. See, e.g., Healy, supra, at pp. 320-22. Clausen himself characterizes Vaughan fees as a form of damages in his response brief, and argues that they are compensatory in nature. Response on p. 39 (quoting *Moore's Federal Practice* for proposition that expenses of suit brought to obtain maintenance and cure are rightly treated as "part of the compensatory damage.").

For determining the proper measure of punitive damages in a

maintenance and cure case, the characterization of Vaughan fees as either compensatory or punitive is of great significance, as will be discussed infra. However, for purposes of determining whether the question of attorney fees in a maintenance and cure case must go to the jury, it is not important whether Vaughan fees are compensatory or punitive; it matters only that they are an element of damages, a point that has been accepted by courts and commentators in both camps.

Finally, and perhaps most importantly, regardless of the many years of debate about the characterization of Vaughan fees, the Supreme Court has recently spoken to the question in the maritime context for the first time since it issued the Vaughan decision nearly fifty years ago. In Atlantic Sounding Co., Inc. v. Townsend, the Court made clear that it considers Vaughan fees to be a form of punitive damages. ___ U.S. ___, 129 S. Ct. 2561, 2571, 174 L. Ed. 2d 382 (citing Vaughan in support of proposition that "punitive damages" have been available in maintenance and cure actions even after passage of the Jones Act). This resolves any remaining ambiguity about the true nature of Vaughan fees, and clarifies that they are a form of damages.

Apart from his misplaced reliance on Washington law and his flawed interpretation of Vaughan, the only other support for Clausen's

assertion that the court rather than the jury decides attorney fees are two federal maritime cases and a comment to a Ninth Circuit pattern jury instruction. As he did below, Clausen places great stock in the Second Circuit's decision in Incandela v. American Dredging Co., 659 F.2d 11 (2d Cir. 1981). That court did find that the judge, rather than the jury, should determine the amount of attorney fees to be awarded. Id. at 15. The Incandela court did not reach this conclusion based on its interpretation of Vaughan or on any recognized principle of maritime law. Indeed, there was virtually no analysis whatsoever.

The Incandela decision is as important for what it does not say as for what it does say. It did not equate fees with costs as an item to be decided by the judge. Id. Rather, the only basis for the decision was the court's belief that determination of the proper amount of fees was too "technical" for jurors and that judges are "better equipped" to determine the amount by virtue of their training and experience. Id. Essentially, the Incandela court did not think jurors were capable of determining the proper amount of attorney fees.

As noted in Icicle's opening brief, this reasoning flies in the face of the theoretical underpinnings of the jury system, the practical realities of how fee awards are determined, and the explicit terms of Washington's

Civil Rule 54(d)(2). As Clausen himself emphasized in the punitive damages portion of his response brief, jurors are entrusted by both the state and federal constitution to make damage awards, and their determination of damages is to be afforded great deference. Response at pp. 46-48; see also Bunch v. Dep't of Youth Servs., 155 Wn.2d 165, 179-80, 116 P.3d 381 (2005). Clausen offers no explanation for the discrepancy between his vigorous defense of the jury's right to determine the proper amount of punitive damages and his equally vigorous insistence that the jury not be allowed to determine the proper amount of attorney fees, which under federal maritime law, are also an element of damages.

Clausen also ignores the fact that juries can and do decide the amount of attorney fee awards. It is not uncommon for jurors to be assisted in this process by testimony from expert witnesses, which remedies any deficiencies in the jurors' own understanding of how to calculate an appropriate fee. Jacob's Meadow Owner's Assn. v. Plateau 44 II, LLC, 139 Wn. App. 743, 761, 162 P.3d 1153 (Div. 1 2007). Washington courts have clearly and repeatedly held that the complexity of an issue, including the determination of attorney fees in particular, is not a sufficient reason to take it from the jury. Id. at 761; Gatudy v. Acme Const. Co., 196 Wash. 562, 569, 83 P.2d 889 (1938); Watkins v. Siler

Logging Co., 9 Wn.2d 703, 712, 116 P.2d 315 (1941).

In addition, the Incandela court's reasoning runs contrary to Washington's Civil Rule 54(d)(2), which plainly supports the notion that jurors are to be entrusted with the task of determining the proper amount of attorney fees. As outlined in Icicle's opening brief, both the federal and state versions of Civil Rule 54(d)(2) provide that where attorney fees are an element of damages under applicable substantive law, they must be proven at trial. CR 54(d)(2); Fed. R. Civ. P. 54(d)(2). Clausen correctly notes that the decision to demand a jury brings with it certain consequences. Here, Clausen filed the present action at law in state court and requested a jury. CP 13. Because attorney fees are an element of damages under the substantive federal maritime law that governs this case, CR 54(d)(2) dictates they must be proven at trial and decided by the jury.

The Williams decision and the comment to the Ninth Circuit pattern jury instruction are similarly unavailing. While it is true that the Williams court did make an attorney fee determination following a jury trial, there is no explanation of the court's reason for doing so, and it does not appear that the court vs. jury argument was raised. Williams v. Kingston Shipping Co., 925 F.2d 721, 726 (4th Cir. 1991). It may well be that the parties so stipulated, as was the case in Peake v. Chevron Shipping

Co., Inc., 2004 AMC 2778 (N.D. Cal. 2004), a case Clausen and the trial court relied upon below but Clausen curiously makes no mention of in his response brief. What is significant in Williams is the court's statement that "strictly speaking, the fee award in admiralty is an element of damages whose source is judicial precedent, not a fee shifting statute." Id. at 723.

As for the comment to the Ninth Circuit pattern jury instruction, it provides that "if the jury finds that the defendant willfully and arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys' fees as determined by the court." CP 309. As noted in Icicle's opening brief, commentary to pattern jury instructions is not binding law.[4] The only source of actual law referenced in the comment is Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir. 1984). However, the citation to Kopczynski follows a separate sentence of the comment which states that a special interrogatory will be required where the jury is asked to find the defendant willfully and arbitrarily failed to pay maintenance and cure. CP 309. This makes sense because Kopczynski does indeed address the use of a special interrogatory in this context. Kopcyznski says **nothing**, however, about whether the attorney fee amount is to be

[4] If it were, Clausen could not have recovered punitive damages. See Comment to Ninth Circuit Pattern Jury Instruction No. 7.11 ("Punitive damages are not available where payment for maintenance and cure is wrongfully denied.").

determined by the jury or by the court, and it therefore does not support Clausen's position.

The Fifth Circuit Pattern Jury Instructions are much more telling in this regard, as they instruct the jury on how to determine the proper amount of attorney fees if it finds willful or arbitrary failure to pay maintenance and cure. Fifth Circuit Pattern Jury Instruction No. 4.11 (Appellant's Appendix A.7). More importantly, as set forth in detail in Icicle's opening brief, the cases directly on point require that this issue go to the jury. See Appellant's Opening Brief at pp. 10-13.

In a "parting shot" footnote on the final page of his response brief, Clausen complains that Icicle's request for relief – namely reversal of the trial court's fee award – is "indiscriminate and harsh." Response at p. 50, n.38. To the contrary, this remedy is not only legally required, it is not unduly harsh, given that Clausen was evidently well aware of the need to prove attorney fees to the jury as an element of damages well before trial. See Appellant's Opening Brief at pp. 15-16 and cases cited therein.

The fact that Clausen's proposed special verdict form provided for determination of the amount of attorney fees by the jury demonstrates that Clausen was well aware of the proper procedure. CP 62. Clausen evidently chose to abandon his plans to submit the attorney fee issue to the jury, but

was fully aware of the issue, and thus cannot claim unfair surprise.

The trial court erred in denying Icicle's motion for judgment as a matter of law seeking dismissal of the attorney fee claim due to Clausen's failure of proof on the issue, and this Court must reverse the trial court's attorney fee award.

B. The Trial Court Abused Its Discretion by Making an Unreasonable Award of Attorney Fees.

To the extent the trial court even had authority to make an award of attorney fees in this case, it abused its discretion by failing to segregate the fees associated with Clausen's maintenance and cure claim from those related to his other causes of action. The trial court also erred in awarding Clausen's attorneys an hourly rate that was unreasonable in light of evidence presented regarding prevailing rates in the relevant community.[5]

1. Icicle Properly Preserved the Trial Court's Error with Respect to the Reasonableness of Its Attorney Fee Award.

Clausen contends that Icicle waived any challenge to the reasonableness of the trial court's fee award by failing to offer any evidence below regarding the reasonableness of the award and by failing

[5] Clausen asserts in his response that the trial court "exercised its independent judgment on fees, as its thoughtful and comprehensive fee ruling plainly demonstrates." Response at p. 27. On the contrary, the trial court's findings and conclusions were an almost verbatim recitation of Clausen's motion for attorney fees. Compare CP 225-239 with CP 420-433.

to assign error to any particular findings of fact made by the trial court with respect to fees. As to the first contention, Icicle did challenge the reasonableness of Clausen's fee request and did present evidence in its opposition to Clausen's fee motion which showed that the fees requested were excessive and unreasonable. CP 270-281 (challenging failure to keep contemporaneous records and failure to segregate time spent on maintenance and cure claim with reference to particular time entries); CP 282-83 and 295-97 (challenging hourly rate and providing evidence of fee awards in similar cases in Seattle area as well as declaration of senior maritime attorney regarding his hourly rate).[6]

As to the second, while Icicle may not have identified specific findings of fact by number in the Assignment of Error portion of Icicle's opening brief, the detailed contentions set forth in the body of the brief left no doubt as to which aspects of the fee award Icicle was challenging on appeal (namely the failure to segregate hours related to the maintenance and cure claim and the excessive hourly rate). Identifying the challenged findings by number would have been impossible because the trial court's findings were not numbered. See CP 420-33. In addition, Icicle included

[6] To the extent that attorney Kevin Coluccio's declaration constitutes an "expert opinion" on fees, as Clausen contends, the declaration of attorney Michael Barcott should likewise be considered "expert" evidence on the issue.

the court's findings and conclusions regarding fees in its Appendix. There is ample Washington authority holding that where a party has sufficiently identified the challenged findings in its brief such that there is no question as to which findings are at issue and no prejudice to the other party, strict compliance with RAP 10.3(g) is not required. See, e.g., Pierce County v. State, 144 Wn. App. 783, 847, n.23, 185 P.3d 594 (2008).

2. Clausen Failed to Meet His Burden to Establish the Reasonableness of the Requested Attorney Fees.

It is Clausen, not Icicle, who bears the burden of establishing that the attorney fees requested are reasonable. Williams, 925 F.2d at 723. In addition, the trial court has a duty to independently assess the reasonableness of an attorney fee award. Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). Here, both Clausen and the trial court failed to do so by refusing to segregate time entries related to maintenance and cure from those related to Clausen's other causes of action. Even a glance at the time entries submitted by Clausen's counsel reveals that much of the time for which they sought and were awarded fees was facially unrelated to the maintenance and cure claim, which is the only cause of action entitling them to fees. See Kopczynski, 742 F.2d at 559 (noting that Vaughan authorized recovery of only those fees "incurred

to secure maintenance and cure award").

Clausen argues that the trial court did "segregate" the time spent on other claims from the time spent on the maintenance and cure claim by making a ten percent overall reduction in the amount of fees requested. Response at p. 28. While it is true that it is within a court's discretion to make such an across-the-board reduction where it is impossible to segregate the actual time entries, that was not the case here.[7] Had the court fulfilled its obligation to independently scrutinize the fee request, it would have been readily apparent that certain entries were unrelated to maintenance and cure on their face and could therefore be excluded. Its failure to do so was an abuse of discretion and is further grounds for reversal of the fee award, or at the very least, remand for recalculation.

The same is true of the court's decision to award fees at the exorbitant hourly rates sought by Clausen's counsel. Icicle presented ample evidence of significantly lower hourly rates awarded to maritime

[7] It bears repeating that any perceived difficulty in segregating the time spent on the maintenance and cure claim should be construed against Clausen's counsel, who knew from the outset of this case that they would be seeking attorney fees and could have kept contemporaneous records with sufficient detail to alleviate any such difficulty. Despite the fact that Clausen's appellate counsel authored a treatise on attorney fees that specifically recommends that plaintiff attorneys maintain contemporaneous records precisely to avoid this problem, no explanation is offered in Clausen's response brief as to why that was not done.

attorneys for comparable work in this community, as well as evidence from an attorney who normally bills at an hourly rate. CP 282-83; 295-97. The trial judge adopted the hourly rate requested by Clausen's attorney. Her failure to independently assure the reasonableness of the rate, and of the award as a whole, was another abuse of discretion that warrants reversal of the fee award, or, in the alternative, remand for recalculation.

C. The Trial Court Erred in Failing to Reduce the Jury's Punitive Damages Award in Keeping with the 1:1 Ratio Dictated by Federal Maritime Law.

In his analysis of punitive damages, Clausen focuses almost exclusively on the Supreme Court's due process jurisprudence and, curiously, on Washington law, neither of which provides the proper standard for assessing the propriety of the jury's $1.3 million punitive damages award. Rather, as Icicle made clear in its opening brief, because this is a maritime case, it is governed by federal maritime principles regarding appropriate limits on punitive damages. In particular, the 1:1 ratio between compensatory and punitive damages set forth in Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) is applicable here, and the trial court erred in not reducing the jury's award accordingly.

1. **The Trial Court's Failure to Apply the Exxon Ratio Is an Error of Law That Is Reviewed De Novo.**

Civil Rule 59 provides a variety of distinct grounds for bringing a motion for new trial or to amend a judgment. CR 59(a)(1-9). Where, as here, the basis for the CR 59 motion is an error in law, the proper standard is de novo, since all errors of law are reviewed de novo. Interlake Sporting Ass'n v. State Boundary Review Bd., 158 Wn.2d 545, 551, 146 P.3d 904 (2006).

2. **Substantive Federal Maritime Law, Particularly the 1:1 Ratio Established in Exxon, Is Controlling in This Case.**

Clausen's claims were brought in state court pursuant to the saving to suitors clause and are governed by substantive federal maritime law. Endicott, 167 Wn.2d at 879 (citing Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10, 74 S. Ct. 202, 98 L. Ed. 143 (1953)). In Exxon, the Supreme Court made it abundantly clear that it was acting in its role as the nation's highest federal maritime common law court, and **not** as the court charged with ensuring compliance with the due process principles of the federal constitution. Clausen's failure to recognize this distinction merits repeating the Exxon Court's own emphatic statement regarding the nature of its decision:

> **Today's enquiry differs from due process review because the case arises under federal maritime**

> **jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard.**

128 S. Ct. at 2626-27 (emphasis added).

Despite this clear direction from the Court, Clausen nevertheless proceeds to analyze the jury's punitive damages award in this case for compliance with constitutional due process limits. What matters here is compliance with substantive maritime law, which is more restrictive than due process and requires that an award of punitive damages in a case governed by federal maritime law be no greater than the amount of compensatory damages.

The reasoning behind the Exxon Court's adoption of this 1:1 ratio is outlined in detail in Icicle's opening brief. In short, the Court considered the purpose of punitive damages, as well as the need for predictability and fairness, and evaluated several possible approaches to limiting excessive punitive damages awards in maritime cases. In light of empirical evidence of jury verdicts showing the median ratio for cases involving the entire spectrum of reprehensible conduct was 0.65:1, the Court adopted the 1:1 ratio as the "fair upper limit" in maritime cases. 128 S. Ct. at 2633. As such, this is the proper limit to be applied in this

case, and the trial court's failure to reduce the jury's punitive damages award in accordance with this limit constitutes reversible error.

Clausen's reliance on Washington state law is also misplaced, not only because a maritime personal injury action brought in state court is governed by federal maritime law, but also because Washington law on punitive damages is in direct conflict with federal maritime law. Clausen's assertion that "application of Washington principles on punitive damages would not offend federal maritime principles" strains credulity, given that with only a few very limited exceptions, punitive damages are not available under Washington law, whereas they are a longstanding feature of maritime law. Barr v. Interbay Citizens Bank, 96 Wn.2d 692, 700, 635 P.2d 441 (1981); Townsend, 129 S. Ct. at 2567. While Icicle's interests would clearly be served by following Clausen's suggestion that Washington punitive damages principles (or lack thereof) be applied in this case, to do so would violate the uniformity principle of maritime law that precludes application of state law in maritime cases where it conflicts with fundamental tenets of maritime law.

Clausen also argues that Exxon's 1:1 ratio should not apply here because the "reprehensibility" of Icicle's conduct warrants a greater punitive damages award. There are two inherent flaws in this argument.

First, the notion of calibrating punitive damages on the basis of reprehensibility comes from the Supreme Court's due process line of cases, and as such, is not applicable in this maritime case. 128 S. Ct. at 2633.

Secondly, as Icicle explained in detail in its opening brief, the reprehensibility of the conduct at issue in Exxon and of that at issue here are comparable, despite the fact that the former was labeled "reckless" and the latter was labeled "willful and wanton." While there typically is a distinction between these two types of misconduct, the actual jury instruction given by the trial court in Exxon made clear that what it termed "recklessness" was actually "extraordinary misconduct." Id. at 2633, n.27. Given the unique definition of "recklessness" in Exxon, the 1:1 ratio is properly applied to what the jury determined here was "willful and wanton" misconduct, and no increase in the ratio is warranted.

Finally, as set forth infra, the attorney fee award in this case is punitive in nature. It is approximately ten times the amount of the unpaid maintenance and cure. The availability of Vaughan fees, taken together with the additional "sting" of any punitive award subject to Exxon, more than satisfies any punitive purpose and the Townsend mandate.

3. Because Vaughan Attorney Fees Are Punitive in Nature, the Proper Measure of Compensatory Damages Is Unpaid Maintenance and Cure.

As noted earlier, whether Vaughan attorney fees are properly characterized as compensatory damages or punitive damages becomes important when considering the proper measure of compensatory damages to use in applying Exxon's 1:1 ratio. While the language of the Vaughan decision lends some support to the notion that attorney fees awarded for willful and wanton failure to pay maintenance and cure are intended to compensate a seaman for the expense incurred in prosecuting his maintenance and cure claim, it is also evident from the Vaughan court's decision that there is a definite punitive quality to such fees. 369 U.S. at 530-31. Numerous courts and commentators have recognized that the employer's misconduct in Vaughan was the driving factor in the Court's award of fees, and that the purposes served by such an award – namely punishment and deterrence – are the same as the purposes served by punitive damages. See, e.g., Kraljic v. Berman Enters. Inc., 575 F.2d 412, 413-14 (2d Cir. 1978); Townsend, 129 S. Ct. at 2571.

As Icicle noted in its opening brief, if the employer's misconduct were not the basis for awarding attorney fees in the maintenance and cure context, such fees would be awarded in all maintenance and cure cases.

Mallor, Jane P., *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. 613, 632-33 (1983); see also Robertson, David W., *Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. Mar. L. & Com. 507, 553 (1996).

Because an attorney fee award in the maintenance and cure context is punitive rather than compensatory, it cannot be counted as compensatory damages in computing the 1:1 ratio. If anything, it should be added to the punitive damages side of the ratio. The trial court erred in including attorney fees as compensatory damages, resulting in a punitive damages award that exceeds the permissible 1:1 ratio established in Exxon.[8]

D. Clausen Is Not Entitled to Attorney Fees on Appeal.

Relying solely on Vaughan, Clausen argues that because he recovered attorney fees below, he is also entitled to them on appeal. That is not the case. The Vaughan decision and its progeny make clear that a seaman may recover attorney fees incurred in obtaining maintenance and cure which has been unreasonably withheld. Clausen has already been

[8] Even if the Court were to reject Exxon and find that the due process analysis applies here, the jury's award must nevertheless be reduced in keeping with due process standards, which the Supreme Court has indicated are generally satisfied with ratios in the single digits. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

awarded the additional maintenance and cure he sought in this action. This appeal has nothing to do with obtaining additional maintenance and cure, but instead deals only with attorney fees and punitive damages. Because his attorneys' efforts before this Court have nothing to do with securing maintenance and cure, fees related to this appeal are not warranted under Vaughan.

III. CONCLUSION

For the foregoing reasons, Icicle respectfully requests that this Court reverse the trial court's attorney fee award and reduce the punitive damages award in accordance with federal maritime law.

RESPECTFULLY SUBMITTED this 15th day of November, 2010.

HOLMES WEDDLE & BARCOTT, P.C.

Michael A. Barcott, WSBA #13317
Megan E. Blomquist, WSBA #32934
Thaddeus J. O'Sullivan, WSBA #37204
999 Third Avenue, Suite 2600
Seattle, Washington 98104
(206) 292-8008
Attorneys for Appellant

G:\1143\21052\pldg\appeal\FINAL Appellant's Reply Brief 11-15-10.doc